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Utah Department of Commerce, and
Division of Consumer Protection

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

FREE SPEECH COALITION, INC., A California
Not-For-Profit Trade Association, On Its Own
Behalf and On Behalf of Its Members,

Plaintiff,

vs.

THE STATE OF UTAH, a body politic; THE
UTAH DEPARTMENT OF COMMERCE, a
department in the executive brnch of the State of
Utah; THE DIVISION OF CONSUMER
PROTECTION, an administrative agency in the
Utah Department of Commerce; MARK
SHURTLEFF in his official capacity as Utah
attorney General of the State of Utah;
GRANCINE GIANI, in her official capacity as
the Executive Director of the utah Department of
Commerce, and in her official capacity as the
Director of the Division of Consumer Protection
in the Utah Department of Commerce,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AS
AGAINST “STATE” DEFENDANTS**

Judge J. Thomas Greene

Case No. 2:05CV00949

Defendants State of Utah, “a body politic”, Utah Department of Commerce, “a department in the executive branch of the State of Utah”, and Division of Consumer Protection, “an administrative agency in the Utah Department of Commerce” (hereinafter “State Defendants”), by and through their attorney of record, Thom D. Roberts, Assistant Utah Attorney General, hereby submit the following Memorandum in Support of their Motion to Dismiss as Against the State Defendants:

The State of Utah, as alleged, is a “body politic” and a sovereign state of these United States. The Utah Department of Commerce, as alleged, is a “department in the executive branch of the State of Utah”. The Department is created in Utah Code Ann § 13-1-2 where the Legislature directed that the Department “shall execute and administer state laws regulating business activities and occupations effecting the public interest”, § 13-1-2(1)(b). The Department is under the supervision, direction and control of the executive director, who is appointed by the governor, with the consent of the Senate, and serves at his pleasure, § 13-1-3. The Department’s budget is submitted to the governor and is set by the Legislature, § 13-1-7. The Division of Consumer Protection is created and established within the Department of Commerce, Utah Code Ann § 13-2-1, and is subject to the policy making and management jurisdiction of the executive director of the Department of Commerce, § 13-1-5. The Division administers and enforces various commercial and consumer protection acts, § 13-2-1(2). The Division Director is appointed by the executive director of the Department of Commerce with the approval of the Governor, § 13-2-2.

The plaintiff has sued these State Defendants for declaratory and injunctive relief alleging violations of the plaintiff's federal and state constitutional rights. The Eleventh Amendment bars such suits for declaratory and injunctive relief against the state. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1995); Pennhurst State Hospital v. Halderman, 465 U.S. 89, 98 (1984); and Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946).

The Eleventh Amendment provides:

“The judicial power of the United States shall not be construed to extend to any suite in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”

The underpinning of the Eleventh Amendment has two parts:

“First, that each state is a sovereign entity in our federal system; and second, that it is inherent in the nature of the sovereign not to be amenable to suit of an individual without its consent.”

Seminole Tribe, 517 U.S. at 54 (internal quotations and citations omitted). The State's consent to be sued in Federal Court must be unequivocally expressed, Edelman v. Georgia, 415 U.S. 651, 673 (1974). The State of Utah has not consented to the suit here. Nor does 42 U.S.C. Section 1983, involving enforcement of civil rights, override the State's Eleventh Amendment immunity. See Quern v. Jordan, 440 U.S. 332, 342 (1979). Further, the Eleventh Amendment prohibition applies to suits against the States or its agencies or departments. See Alabama v. Pugh, 438 U.S. 781 (1978).

The suit against these State Defendants is against the “State”. The Utah Department of Commerce is alleged to be “a department in the executive branch of the State of Utah” and the Division of Consumer Protection “an administrative agency in the Utah Department of

Commerce.” See complaint. In addition, the statutes creating the Department of Commerce and the Division of Consumer Protection similarly render a suit against them a suit against the State barred by the Eleventh Amendment.

In addition, the State and its agencies are not “persons” under 42 U.S.C. Section 1983. Will v. Michigan State Police, 491 U.S. 58 (1989). Thus, an action against this Department and Administrative Agency for violation of civil rights under Section 1983 is not available.

CONCLUSION

Suit against these “State Defendants” is an action against the State and is barred by the Eleventh Amendment. In addition, the State Defendants are not “persons” under 42 U.S.C. 1983 and an action under that section is not available against them for alleged violation of civil rights. Therefore, this matter should be dismissed as against these State Defendants.

Dated this _____ day of _____, 2005.

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THOM D. ROBERTS
Assistant Attorney General
Attorneys for State Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the MEMORANDUM IN SUPPORT OF MOTION TO DISMISSAL AS AGAINST “STATE” DEFENDANTS was sent by U.S. Postal Service first class mail, prepaid, and email on this the _____ day of December, 2005.

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